

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JUAN GARCIA,

Petitioner,

vs.

WILLIAM DONAT, *et al.*,

Respondents.

3:10-cv-00130-ECR-RAM

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Before the Court is respondents' motion to dismiss. (Docket #8).

I. Background

Petitioner was charged in a Nevada justice court by criminal complaint with two counts of sexual assault with a minor under the age of fourteen. (Exhibit 2). Petitioner waived his right to a preliminary hearing and was bound over to the state district court. (Exhibits 1 & 3). Petitioner plead guilty to one count of sexual assault with a minor under the age of fourteen. (Exhibits 4 & 5). Petitioner signed the guilty plea memorandum and was convicted. (Exhibits 5 & 6). Petitioner did not file a direct appeal.

Petitioner filed a post-conviction habeas petition in state court. (Exhibit 7). The state district court dismissed the petition on grounds of untimeliness pursuant to NRS 34.726. (Exhibit 9).

1 On January 7, 2010, the Nevada Supreme Court affirmed the dismissal of the habeas petition, finding
2 that the petition was untimely filed under NRS 34.726. (Exhibit 10). On February 24, 2010,
3 petitioner submitted his habeas petition to this Court. (Docket #1).

4 **II. Discussion**

5 Respondents move to dismiss the petition on grounds of procedural bar. “Procedural
6 default” refers to the situation where a petitioner in fact presented a claim to the state courts but the
7 state courts disposed of the claim on procedural grounds, instead of on the merits. A federal court
8 will not review a claim for habeas corpus relief if the decision of the state court regarding that claim
9 rested on a state law ground that is independent of the federal question and adequate to support the
10 judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

11 The *Coleman* Court stated the effect of a procedural default, as follows:

12 In all cases in which a state prisoner has defaulted his federal claims in
13 state court pursuant to an independent and adequate state procedural
14 rule, federal habeas review of the claims is barred unless the prisoner
15 can demonstrate cause for the default and actual prejudice as a result of
16 the alleged violation of federal law, or demonstrate that failure to
17 consider the claims will result in a fundamental miscarriage of justice.

18 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural
19 default doctrine ensures that the state’s interest in correcting its own mistakes is respected in all
20 federal habeas cases. *See Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003).

21 To demonstrate cause for a procedural default, the petitioner must be able to “show
22 that some *objective factor external to the defense* impeded” his efforts to comply with the state
23 procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to exist, the external
24 impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499
25 U.S. 467, 497 (1991). Ineffective assistance of counsel may satisfy the cause requirement to
26 overcome a procedural default. *Murray*, 477 U.S. at 488. However, for ineffective assistance of
counsel to satisfy the cause requirement, the independent claim of ineffective assistance of counsel,

1 itself, must first be presented to the state courts. *Murray*, 477 U.S. at 488-89. In addition, the
 2 independent ineffective assistance of counsel claim cannot serve as cause if that claim is
 3 procedurally defaulted. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). With respect to the
 4 prejudice prong of cause and prejudice, the petitioner bears:

5 the burden of showing not merely that the errors [complained of]
 6 constituted a possibility of prejudice, but that they worked to his actual
 7 and substantial disadvantage, infecting his entire [proceeding] with
 8 errors of constitutional dimension.

9 *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170
 10 (1982). If the petitioner fails to show cause, the court need not consider whether the petitioner
 11 suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d
 12 528, 530 n.3 (9th Cir. 1988).

13 In the instant case, the claims in the federal petition are identical to the claims in the
 14 state habeas petition. (Docket #1; Exhibit 7). On appeal from the denial of petitioner's state habeas
 15 petition, the Nevada Supreme Court dismissed the petition as untimely, citing NRS 34.726(1). The
 16 Ninth Circuit has held the application of the procedural bar at issue in this case – NRS 34.726(1) – to
 17 be independent and adequate grounds. *Moran v. McDaniel*, 80 F.3d 1261, 1268-70 (9th Cir. 1996).
 18 The same claims raised in the federal petition were procedurally defaulted in state court on adequate
 19 and independent state grounds. Petitioner has presented no meritorious grounds for cause and
 20 prejudice, and has not demonstrated that failure to consider the claims will result in a fundamental
 21 miscarriage of justice. The claims brought in the federal petition were procedurally defaulted in state
 22 court and are barred from consideration by this Court.

23 **III. Certificate of Appealability**

24 In order to proceed with an appeal, petitioner must receive a certificate of
 25 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435
 26 F.3d 946, 950-951 (9th Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir.

2001). Generally, a petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Id.* This Court has considered the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a certificate of appealability, and determines that none meet that standard. The Court will therefore deny petitioner a certificate of appealability.

IV. Conclusion

IT IS THEREFORE ORDERED that respondents’ motion to dismiss (Docket #8) is **GRANTED**.

IT IS FURTHER ORDERED that the petition is **DISMISSED IN ITS ENTIRETY**, as procedurally barred.

IT IS FURTHER ORDERED that petitioner is **DENIED A CERTIFICATE OF APPEALABILITY**.

IT IS FURTHER ORDERED that the Clerk **SHALL ENTER JUDGMENT ACCORDINGLY**.

DATED this 20th day of January, 2011.


UNITED STATES DISTRICT JUDGE